In the Supreme Court of the United States

OCTOBER TERM 1964

No. 14

FIBREBOARD PAPER PRODUCTS CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

Petitioner's Reply Brief

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Petitioner's Reply Brief

Early in its brief, the Board sets forth two questions which, it says, are "component parts" of the first of the questions with respect to which certiorari was granted (Bf. p. 2). These two component questions are in substance (1) whether Petitioner was under a duty to bargain about whether to contract out its maintenance work, and (2) assuming such a duty to exist, whether Petitioner violated that duty. Later on, the Board states that "Petitioner apparently concedes" that if it was under a duty to bargain, that duty was violated (Bf. p. 20).

Petitioner has made no such concession. On the contrary, it has maintained throughout the case that it in fact did bargain, and it complained in its petition for certiorari of the Board's failure to make findings upon the question and to state its reasons therefor[1] We did not argue that question in our opening brief because we understood that the Court had denied certiorari with respect thereto[2] and that argument of the question therefore would be improper.

We turn to our reply to the arguments of the Board and the Union.

SUMMARY OF ARGUMENT

I.

If the Court should abandon the view that the Act does not require bargaining about whether or not an employer shall carry on a particular operation but requires bargaining only about the wages, hours and other terms and conditions governing employment in those operations upon which he decides, the language of the Act would permit of no stopping point short of the Board's present position that the subjects of mandatory bargaining are unlimited—that they "embrace any provision which either party wishes to put in the agreement" including provisions regarding "prices, types of product, volume of production, and even methods of financing." That position conflicts with this Court's holding in *NLRB v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342 (1958) that the subjects of mandatory bargaining are limited. It is inconceivable that the Taft-Hartley Congress intended any result such as that for which

1. See the second question raised by our petition (p. 2) and the argument thereon (pp. 17-20).

2. The Court granted certiorari on only the first and third questions set forth in our petition (R. 183-184).

the Board now contends. But even if "terms and conditions of employment" embraced "any stipulation under which the workers agree to be employed and the management to employ them," as the Board contends, the fact still would remain that the obligation which the Board now urges the Court to impose is not concerned with the conditions under which workers are to be employed but rather with the question whether any employment relationship shall exist.

The Board's deprecation of the administrative, judicial, and legislative histories of the statutory language is unjustified. The Board's historic interpretation of that language as not requiring an employer to bargain about whether to "change his business structure, sell or contract out a portion of his operations, or make any like changes" (*Mahoning Mining Company*, 61 NLRB 792, 803 (1945)) was approved by the courts, survived two general revisions of the Act, and was never questioned until the Board, in *Town and Country Manufacturing Company, Inc.*, 136 NLRB 1022 (1962), decided to change the law.

Bargaining about such matters is by no means as widespread in practice as the Board would make out. But this is a matter upon which we need not waste words, for the question whether bargaining about a particular subject is mandatory depends for its answer, not upon the "prevailing circumstances of contemporaneous labor-management relations," but "upon what is a correct judicial interpretation of the Act as it was written by Congress." See *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 202 (1962).

The Board's involved analysis of the variety of circumstances affecting what would be required of an employer in discharging the newly conceived bargaining duty is not reassuring. The Board does not "anticipate the answers," but it nevertheless expects the employer to do so and to

make a change in his operations only at the risk that some two or three years later he will be ordered to restore the *status quo ante* because the Board's interpretation of what he has said or done, or failed to say or do, does not conform to its notion of good faith bargaining.

The Board's position is not supported by this Court's decisions. On the contrary, it cannot be reconciled with *NLRB v. Wooster Division of Borg-Warner Corporation, supra,* or the Court's recognition in *Wiley and Sons v. Livingston,* 376 U.S. 543, 549 (1964) of

> ". . . the rightful prerogative of owners independently [of unions] to rearrange their businesses and even eliminate themselves as employers . . ."

II.

If Petitioner was under a duty to bargain about whether to let the maintenance contract, it satisfied that duty. Petitioner, before letting the contract, advised the Union of its intention to do so. It met with the Union's negotiating committee, stated its position frankly and supported that position with a statement of its reasons, entertained the only proposals the Union saw fit to make, rejecting them for good and sufficient reasons which it explained, and said that it would entertain a proposal, which the Union did not see fit to make, that contracting be deferred to give time for further discussion of the problem. Yet Petitioner stands convicted of a refusal to bargain. The Board's decision demonstrates the impediment which its new concept of the scope of mandatory bargaining presents to the operation of a business.

III.

The statement in our opening brief that the present case "is the first instance in the history of the Act in which the

Board has ordered reinstatement in a case involving only a refusal to bargain" states the whole truth. In the case of an unfair labor practice strike induced by an employer's refusal to bargain, the theory upon which the Board orders reinstatement of striking workers is that the employer's refusal to take them back constitutes a discharge for union activity and violates section 8(a)(3).

The legislative and judicial history of section 10(c) compels the conclusion that it protects discharges for legitimate business reasons as well as discharges for misconduct. That conclusion is not inconsistent, as the Board asserts, with its practice of reinstating unfair labor practice strikers, for, as above stated, this is done upon the theory that the employer's refusal to take them back constitutes a discharge for union activity.

The requirement that Petitioner resume performance of its maintenance operation prior to bargaining is punitive. While the Board is permitted a certain discretion in fashioning a remedy, it is not licensed to abuse that discretion. Except for *Town and Country Manufacturing Company, supra,* which involved a section 8(a)(3) violation, and *Adams Dairy, Inc.,* 137 NLRB 815 (1962), in which enforcement was denied, 322 F.2d 553 (8th Cir. 1963), the present case is the only one, out of the many applying the Board's new concept of the scope of mandatory bargaining, in which the Board has ordered restoration of the *status quo ante.* The capricious and punitive character of the Board's order in the present case is demonstrated by comparing it with the Board's most recent decision on contracting out, *Jersey Farms Milk Service, Inc.,* 148 NLRB No. 139, released on October 2, 1964, as this brief was being written, and reproduced in the Appendix hereto.

ARGUMENT

I. Petitioner was not under a duty to bargain about whether to contract out its maintenance operation.

A. The subjects of mandatory bargaining are not unlimited, as the Board contends; they do not embrace the question whether an employer shall carry on a particular operation.

The Board's brief reveals its position to be what we had deduced from its decision in this and other post-*Town and Country Manufacturing Company* cases, namely, that the subjects of mandatory bargaining are without limit. "Terms and conditions of employment," the Board asserts, "embrace any provision which either party wishes to put in the agreement" (Bf. pp. 21-22); they "include any stipulation which either party considers so vital as to wish to make it part of the bargain" (Bf. p. 23). Thus, the same authority who in 1948 was still arguing that under a proper construction of the Act, there was *no* subject about which bargaining was mandatory (*Cox and Dunlop,* 63 Harv. L. Rev. 389, 396-397 (1948)),[3] has now gone to the opposite extreme of contending that there is *no* subject about which bargaining is *not* mandatory.

The two extremes (aside from the fact that they are both extremes) have this in common: Just as the 1948 contention came "too late in the day" (*Cox and Dunlop, supra,* at 397), so also does the 1964 contention; it has been settled by decisions of the Board and the courts, including this Court (see Bd. Bf. p. 22, n. 10), that there are many subjects about which bargaining, although permissible, is *not* mandatory and that a party is *not* entitled to insist to the

3. The authors there argued: ". . . the use of the disjunctive 'or' in the critical phrase in section 9(a) is more consistent with the notion that the employer is not to bargain with minority unions about any of the listed subjects of bargaining than it is with the conclusion that he must bargain with the majority union about each and every subject embraced within the phrase" (63 Harv. L. Rev. at 396-397).

point of impasse upon any and every provision which he "considers so vital as to wish to make it a part of the bargain." This Court's decision to the foregoing effect was rendered in *NLRB v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342 (1958), to which we referred at some length in our opening brief (pp. 18, 19, 24, 29).

The Board concedes that its new concept would require bargaining "about a host of subjects heretofore regarded as 'management prerogatives,' including prices, types of product, volume of production, and even methods of financing" (Bf. p. 22), but asserts that "as a practical matter," the scope of bargaining would be "confined by the range of the employees' vital interests" (Bf. pp. 22-23). The Board's faith in the self-restraint of unions is not remarkable for its realism. As demonstrated by the cases to which we referred at pages 20 and 21 of our opening brief, unions in the past have regarded "the range of the employees' vital interests" as extending to control and restriction of the sale by an employer of his products, of the kinds of merchandise in which he may deal, of the hours during which he may do business, and of his prices and markets. On occasion, union proposals have been dictated by a desire for new fields to conquer,[4] by venality of the union leader-

4. A recent example was a union proposal that an employer contribute to an "industry promotion fund." See *Detroit Resilient Floor Decorators Local Union No. 2265*, 136 NLRB 769 (1962), enf. 317 F.2d 269 (6th Cir. 1963). The Board, in holding that the proposal did not relate to a subject of mandatory bargaining, said:

> "The ability of an employer or an industry to meet changing conditions may, as the Respondent argues, affect employees' opportunities in the long run, and labor organizations are understandably concerned with the future of the industries from which their members derive their livelihood. • • • To hold, however, under this Act, that one party must bargain at the behest of another on any matter which might conceivably enhance the prospects of the industry would transform bargaining over the compensation, hours, and employment

ship or its desire for power,[5] and even by political and ideological considerations.[6]

We do not find convincing the Board's contention that the national policy for which it now contends would minimize "economic warfare" (Bf. p. 23; and see pp. 37-42). We suggest that extension of the protection of the Act to strikes in support of proposals "about a host of subjects heretofore regarded as 'management prerogatives'" would foment and encourage economic warfare in new fields.

However, even if the Board's position had no other weakness, it would still have this Achilles' heel: It represents a far-reaching change in what this Court has heretofore held the law to be. The subjects of mandatory bargaining are *not* unlimited; there are many subjects about which bargaining, although permissible, is *not* mandatory, and about which "each party is free to bargain or not to bargain." *NLRB v. Wooster Division of Borg-Warner Corporation, supra*, 356 U.S. at 349. The only question now open is where Congress drew the line.

The answer to the foregoing question, we submit, is that which we gave in our opening brief. The Act does not

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conditions of employees into a debate over policy objectives." (136 NLRB at 771.)

The decision was rendered a month before the Board decided in *Town and Country Manufacturing Company* to change the law. Under the concept for which the Board now contends, the employer would be under a duty to bargain upon the proposal.

5. Hence, the enactment of section 302 of the Taft-Hartley Act declaring unlawful payments to unions or their officers with certain exceptions, including contributions to certain types of trust funds having specified safeguards (29 U.S.C. § 186).

6. Hence, the enactment as section 9(h) of the Taft-Hartley Act of the provision (later repealed as unworkable, 73 Stat. 525) denying the facilities of the Board to unions whose officers failed to file non-communist affidavits (61 Stat. 136, 146). See also *NLRB v. Longshoremen's Association*, 332 F.2d 992 (4th Cir. 1964), involving refusal of a union to permit longshoremen employed by a stevedoring contractor to service a foreign ship trading with Cuba.

require bargaining about the composition of an employer's business operations; it requires bargaining only about the wages, hours and ot' 'r terms and conditions upon which men are to be employed in those operations upon which he decides. This, we repeat, is the interpretation to which the Board and the courts had adhered, and to which Congress had twice given its tacit approval, during the twenty-seven years which elapsed before the Board's adoption of its present position (see our opening brief, pp. 14-16, 30-36).

The language of the Act does not permit of any middle ground between the foregoing interpretation and that which the Board now advocates. If the Court should start down the path along which the Board seeks to entice it, there would be no stopping point short of mandatory bargaining about "prices, types of product, volume of production, and even methods of financing."[7]

We do not understand how anyone acquainted with the temper and purposes of the Taft-Hartley Congress could believe that it intended by its use of the phrase "wages, hours, and other terms and conditions of employment" to call for such a result. If that Congress was interested in

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7. This the Board is candid enough to concede (Bf. p. 22). However, both the Board and the Union seem to be suggesting at points in their briefs that a decision against Petitioners in the present case would not really be a start down the path above mentioned. Thus the Board and the Union intimate that Fluor was not truly an independent maintenance contractor by referring to it as a "labor contractor" (Bd. Bf. 63) and a "labor broker" (Un. Bf. p. 5). That suggestion is foreclosed by the allegation of the complaint that Fluor undertook to perform the maintenance work "acting as an independent contractor, supplying its own employees" (R. 6). Both the Board (Bf. p. 27) and the Union (Bf. p. 5) assert that the work had to be done in any event, but this does not differentiate the case from a case involving some other type of contract, or the use of common-carrier trucks, or the purchase of a component, or even the sale of a business. In each case, the work still has to be done. The controlling fact is that the employer has rearranged his business so that he no longer performs the operation himself; it is performed by another employer.

enacting extremes, its interest most certainly did not lay in the direction of the extreme represented by the Board's present position.

But even if the Board's present position were valid, it would be difficult to see how it could have any application to a case like the present. If, as the Board contends, the phrase "terms and conditions of employment" embraced "any stipulations under which the workers agree to be employed and the management to employ them" (Bf. pp. 21-22), the fact still would remain that Petitioner did not want to employ anyone in the bargaining unit in question and that, as pointed out in the Board's original decision, the obligation which this Court is now urged to impose is not concerned with the conditions under which workers are to be employed but rather the question whether any employment relationship shall exist. See our opening brief, pp. 36-39.

B. Our account of the past interpretation of the Act is historically accurate; the present decision represents a change in the law as it had theretofore been construed with Congressional approval.

The account in our opening brief (pp. 30-33) of the administrative interpretation of the Act is not, as the Board asserts, "historically inaccurate." The Board's decisions held exactly what we state that they held. While in *Brown-McLaren Manufacturing Company,* 34 NLRB 984 (1941), the employer had discharged "whatever duty" it may have "had prior to September 21, 1937, to bargain with the union for a wage reduction as a means of avoiding the necessity for . . . subcontracting or transfer" (34 NLRB at 1006), it nevertheless refused repeatedly during the ensuing two years to bargain about the letting of contracts and removals of machinery notwithstanding an offer by the union in March, 1938, "to accept a reduction in wages" (34

NLRB at 1003). In *Mahoning Mining Company,* 61 NLRB 792 (1945), complaint was made not only of the employer's refusal to bargain with respect to employees of the contractor, but also of its conduct in entering into the contract without binding the contractor to the terms of its union agreement (61 NLRB at 803). However, if the case was distinguishable on its facts, there certainly was nothing equivocal about its language.

> "... the Board has never held that once it has established an appropriate unit for bargaining purposes, an employer may not in good faith without regard to union organization of employees, change his business structure, sell or contract out a portion of his operations, or make any like change which might affect the constituency of the appropriate unit without first consulting the bargaining representative of the employees affected by the proposed business change." 61 NLRB at 803.

The Board attempts to distinguish certain of the decisions which we have cited upon the ground that there is a difference between going out of business and contracting out (Bd. Bf. p. 61). But the decisions did not regard the two situations as different. In *Walter Holm Co.,* 87 NLRB 1169 (1949), the Board was dealing with contracting out and equated it with "going out of business" (see our opening brief, pp. 31-32). In *Celanese Corporation of America,* 95 NLRB 664 (1951), the Board did the same thing (see our opening brief, p. 32). And in *Mahoning Mining Company,* quoted above, the Board spoke in a single breath of the employer's right to "sell or contract out" without prior consultation with the union.

The language above quoted from *Mahoning Mining Company* was not buried in a trial examiner's report but was the language of the Board itself and when the Taft-Hartley Act was passed two years later, was the Board's latest pro-

nouncement upon the subject. Presumably, Congress took the Board at its word.

The Board's brief (p. 60) refers to the fact that in 1947, the House bill contained a detailed listing of the subjects upon which bargaining was to be required and that the minority report of the House Labor Committee criticised the listing upon the ground, among others, that it would exclude "subcontracting of work, and a host of other matters." (H.R. Rep. No. 245, 80th Cong., 1st Sess. 64, 71 (1947).) However, the Board neglects to mention that the same Congressmen who had signed the House minority report[8] also voted against the bill as finally enacted (93 Cong. Rec. 3671). We have not relied upon this bit of legislative history because it is equivocal, but by the same token, we do not think that the Board can derive comfort from it.

We have never contended, as the Board seems to suggest that we have, that section 8(d) of the Act excludes from its bargaining requirement all subjects other than those which the Board, prior to 1947, had specifically held to be subjects of mandatory bargaining. What we do contend is that section 8(d), in adopting the language which section 9(a) had contained from the beginning, adopted the construction which the Board had placed upon that language in holding that it did *not* require an employer to bargain about whether he should "change his business structure, sell or contract out a portion of his operations, or make any like change." *Mahoning Mining Company, supra.* And what we further contend is that when, in 1959, after the rendition of four more Board decisions to the same effect,[9] Congress again

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8. Congressmen Kelley, Kennedy, Klein, Lesinski, Madden and Powell.

9. *Walter Holm & Company,* 87 NLRB 1169 (1949), *Celanese Corporation of America,* 95 NLRB 664 (1951), *Krantz Wire & Mfg. Co.,* 97 NLRB 971 (1952), and *National Gas Company,* 99 NLRB 273 (1952), all digested at pages 31-33 of our opening brief.

subjected the Act to a general revision without changing the pertinent language, it again ratified that construction.

As for *Gerity Whitaker Co.*, 33 NLRB 393 (1941), which the Union cites at page 24 of its brief, that was a case of a transfer of operations in which "a substantial cause of the transfer was the Gerity's plan to thwart the Metal Polishers and evade Gerity Whitaker's obligations under the contract and the Act." 33 NLRB at 406. The Board therefore held:

> "Thus Gerity Whitaker, *as part of the unlawful plan*, settled unilaterally a fundamental question concerning terms and conditions of employment in which its employees were vitally interested, forestalled collective bargaining, and thereby refused to bargain collectively within the meaning of Section 8(5) of the Act." 33 NLRB at 406; emphasis supplied.

The Union, at pages 24 and 25 of its brief, cites certain cases (all post-Taft-Hartley) as having held "that an employer may not transfer work from one plant to another without bargaining with the union representing the affected employees," but the Union avoids saying what the employer was supposed to bargain about. All of these cases were cited at pages 14 and 15 of our opening brief. What they in fact held was that the employer should have bargained about *transferring employees* (tenure of employment). In none of them was there the slightest suggestion that the employer should have bargained about whether it should move the work; on the contrary, in *Rapid Bindery, Inc.*, the Court of Appeals expressly stated:

> "We are also of the opinion that inasmuch as the move was made through a legitimate exercise of managerial discretion the issue of whether it was to be made need not have been submitted by respondents for discussion at the collective bargaining table." 293 F.2d at 172.

At pages 26 and 27 of its brief, the Union cites certain cases (all post-Taft-Hartley and all but one post-Landrum-Griffin) as having held that "an employer violates the duty to bargain when he unilaterally contracts out his employees' jobs without first bargaining with the union." One of the cases cited (*Shamrock Dairy, Inc.*), like the cases mentioned in the preceding paragraph, involved failure to give the union an opportunity to bargain about tenure of employment. All of the others, like *Gerity Whitaker Co., supra,* involved contracting out for the purpose of thwarting unionization, and the finding of a refusal to bargain was based upon that fact. The same was true of the cases cited by the Board at pages 55-58 of its brief. None of these cases suggest that the employer would have been guilty of a refusal to bargain in the absence of the unlawful motivation above mentioned. On the contrary, in *NLRB v. Brown-Dunkin Company,* the court said:

> "But the Company was free to subcontract the employees' work, thereby severing the employer-employee relationship, so long as the subcontracting was not made a subterfuge or an easy device for evading the statutory obligations to bargain in good faith. The crucial and decisive fact is whether, as the Board found, the work of the employees was subcontracted to another in order to evade the collective bargaining process. The Company may not discontinue a part of an integrated operation merely because the employees engaged in the particular unit seek Union representation. In circumstances like these, motivation becomes important, indeed decisive . . ." 287 F.2d at 19.

Neither the Board nor the Union make any reference to the numerous other cases cited at page 15 of our opening brief which likewise made the legality of unilateral action in contracting out work or closing a plant depend entirely upon the employer's motive.

It is true, as the Board asserts, that the remarks quoted at page 16, n. 5, of our opening brief from Arthur J. Goldberg, "Management's Reserved Rights: A Labor View," were directed to management's reserved rights under a bargaining contract. But it is also true that those remarks dealt with "the countless questions which arise and are not covered by wages, hours, and working conditions." "Management," it was stated, "determines the product, the machine to be manned, the manufacturing method, the plant layout, the plant organization, and innumerable other questions." When the employer institutes a new method of manufacture, the union's interest lies in the fixing "of working arrangements, crews, spell periods, schedules, etc." This, we submit, is exactly the line which Congress drew.

It also is true that no mention was made one way or the other of contracting out, but for what was the general understanding upon that subject, we refer the Court to an authority upon which the Board, in other connections, has placed considerable reliance, to wit, *Slichter, et al., The Impact of Collective Bargaining on Management* (Brookings Institution, 1960), where, at page 280, the authors state:

> "Historically, American business enterprise has been free to decide the extent to which it would subcontract some of its work to other enterprises. These decisions were considered an inherent management function not affected by the presence or absence of a union."

C. The notions of the Board and Union as to the extent and success in practice of bargaining about contracting out are exaggerated, and in any event are irrelevant.

Both the Board and the Union assert that in practice, bargaining about subcontracting is widespread. To substantiate that assertion, they refer to bargaining contracts which

contain provisions restricting the employer's right to contract out and to arbitration awards holding that the employer's right to contract out is restricted even in the absence of such a provision.

The only study of which we know of the number of contracts containing provisions restricting contracting out is the study by the Bureau of Labor Statistics to which we referred at page 27 (n. 15) of our opening brief. Of the 1687 major collective bargaining contracts studied, fewer than one-fifth (18+ percent) made any reference to contracting out and only four prohibited the practice outright.

As for the arbitration awards cited by the Board, some do not hold what the Board cites them as holding[10], and others are the product of peculiar notions (often those of laymen) as to the nature of collective bargaining contracts[11]

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10. *Kennecott Copper Corp.*, 34 L.A. 763, cited at page 33 of the Board's brief, held that the contract did *not* contain an implied prohibition of the contracting out there involved. To the same effect was *Temco Aircraft Corp.*, 27 L.A. 233, cited at page 33, n. 27 of the Board's brief.

11. The notion that a right upon the part of the employer to contract out work would render a collective bargaining contract "illusory" or enable him to "subvert" its provisions springs from a misconception of the nature of a bargaining contract. As this Court has said:

> "Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established" (*J. I. Case Co. v. NLRB*, 321 U.S. 332, 334-335 (1944)).

and as to what this Court has held.[12] On the other hand are many awards applying the traditional and sensible view that an employer retains all of the rights which he would have in the absence of contract except as the contract otherwise provides.[13] If, as the Board asserts, contracting out is "one of the most inflammatory issues in labor-management

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12. For example, *Vulcan Rivet & Bolt Co.*, 36 L.A. 871, referred to this Court as having held in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), that "where the Agreement contains no specific reference to contracting out of work . . . since the Agreement does not allow contracting out, the employer may not unilaterally contract out work within the job classifications covered by the Agreement" (36 L.A. at 872-873). Of course, the *Warrior & Gulf* case held no such thing. It held merely that a union contention that its bargaining contract prohibited contracting out, no matter how lacking in merit that contention might be, was sufficient to raise a question as to the interpretation of the contract within the meaning of the arbitration clause.

13. *Phillips Petroleum Co.*, 33 L.A. 379; *California and Hawaiian Sugar Refining Corporation*, 35 L.A. 695; *Hewitt-Robins, Inc.*, 30 L.A. 81; *Monsanto Chemical Co.*, 27 L.A. 736; *Mansfield Tire and Rubber Co.*, 35 L.A. 434; *Braun Baking Co.*, 37 L.A. 169; *Black-Clawson Co.*, 34 L.A. 215; *Wisconsin Natural Gas Co.*, 31 L.A. 880; *Bethlehem Steel Co.*, 30 L.A. 678; *Illinois Bell Telephone Co.*, 15 L.A. 274. That view was voiced by this Court in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), when it said:

> "Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from performance of them. Management hires, fires, and pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions. A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes." (363 U.S. at 583.)

And see *Handler and Hays, Cases and Materials on Labor Law* (4th Ed., 1963), p. 386.

relations today" (Bd. Bf. p. 37), this is largely attributable to the Board's decision in the present case.[14]

However, we do not propose to allow the question before the Court to be lost in a fog of irrelevancies. The content of contract proposals made in practice is as varied as the ambitions, sense of responsibility and ingenuity of the union leaderships who make them. They have by no means been confined to subjects of mandatory bargaining, and employers have not always been successful in resisting them. Proposals have been made and accepted upon subjects about which bargaining is not even permissible.[15] The question whether bargaining upon a particular subject is mandatory depends for its answer, not upon the "prevailing circumstances of contemporary labor-management relations," but upon "what is a correct judicial interpretation of the Act as it was written by Congress." See *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 202 (1962).

D. The Board's argument that the duty to bargain would be easily satisfied and no obstacle to efficient business management is not reassuring.

In an effort to render its new bargaining concept more palatable, the Board argues in substance that in some circumstances the duty to bargain would be easily satisfied. It is not necessarily true, it says, "that an employer must

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14. See *Chandler, Management Rights and Union Interests* (McGraw-Hill, 1964), pp. 7, 242, cited at page 37 of the Board's brief.

15. See, e.g., *Charles E. Daboll, Jr.*, 105 NLRB 311 (1953), enf. 216 F.2d 443 (9th Cir. 1954); cert. den. 348 U.S. 917; *Krambo Food Stores, Inc.*, 106 NLRB 870 (1953); *Seaboard Terminal and Refrigeration Co.*, 114 NLRB 1391 (1955); *Reading Tube Corporation*, 120 NLRB 1604 (1958); *Standard Molding Corporation*, 137 NLRB 1515 (1962); *International Association of Machinists*, 123 NLRB 627 (1959); enf. 279 F.2d 761 (9th Cir. 1960), cert. den. 364 U.S. 890; *Employing Lithographers*, 130 NLRB 968 (1961), enf. 301 F.2d 20 (5th Cir. 1962).

always consult with the union before letting . . . a contract"[16] (Bf. p. 43). Whether or not prior consultation would be required would depend "upon each particular situation, including the terms of any relevant collective agreement and the customs and practices of the industry" (*id.*). ". . . one can imagine some situations in which business exigencies would necessitate prompt action but others in which there would be ample time for detailed negotiation" (Bf. p. 44). Whether unilateral action without prior negotiation "is appropriate in some cases can be decided when the question is raised in a particular case" (Bf. p. 49). The answer may depend on "business exigencies" or on "the kind of subcontracting" (*id.*). The required length of the negotiations also would depend on "the character of the subcontracting and the exigencies of the particular business situation" (*id.*); it "would vary with the circumstances" (Bf. p. 50), and would have "to take into account the exigencies of the business and the potentials of further negotiations" (Bf. p. 51).

The Board disclaims any attempt at an analysis of "the problem in all of its ramifications" (Bf. p. 48), and says that it does "not anticipate the answers" (Bf. p. 49). However, it expects the employer to do so. And it expects him to do so, not only with respect to contracting out but also with respect to the purchase of new machines, the adoption of new processes, the purchase of components in place of fabricating them himself, the marketing of his product through independent distributors rather than through a sales force of his own, the shipment of his products by common or contract carrier rather than by trucks of his own, the performance of particular operations in one plant rather than in

16. Contrast this statement with the following from the Board's decision in the present case:

> ". . . prior discussion with a duly designated bargaining representative is all that the Act contemplates. *But it commands no less*" (R. 21; emphasis supplied).

another, the purchase of a product already packaged rather than packaging it himself, the sale or discontinuance of an operation, the discontinuance of an unprofitable line (for all of the foregoing, see cases cited in our opening brief, pp. 17-18), and a "host" of other subjects about which the Board would now require bargaining, "including prices, types of product, volume of production, and even methods of financing" (Bd. Bf. p. 22).

"An employer," the Board asserts, "is under no duty to yield to the union" (Bf. p. 49), but the fact remains that yielding is the only sure way of avoiding conviction of a refusal to bargain.

An employer need not engage "in fruitless marathon discussions at the expense of frank statement and support of his position" (Bd. Bf. p. 51); yet frank statement and support of its position convicted Petitioner of a refusal to bargain.

It is literally impossible, as the Board's brief demonstrates, for an employer to judge with nicety just what is required of him or to anticipate the interpretation which the Board will later place upon what he has said or failed to say and upon what he has done or failed to do. If he is unwilling to yield to the union's position, then caution requires that he engage in the "marathon discussions" above mentioned, and even these will not assure him of safety. Two or three years later, he may find himself confronted, as is Petitioner in the present case, with an order that he restore the *status quo ante*, reinstate displaced employees with back pay, and start all over again. Because it states the matter so well, we refer the Court once again to the dissent from the Board's supplemental decision in the present case (R. 32):

"The time involved in extensive negotiations and in protracted litigation before the Board, together with the numerous technical vagaries, practical uncertainties, and changing concepts which abound in the area of so-called 'good faith bargaining,' make it impossible for management to know when, if, or ever, any action on its part would be clearly permissible. These factors, together with the crushing, burdensome remedy, which this Agency will retroactively impose upon a given enterprise, should the National Labor Relations Board determine that the action of management was (for whatever reason) improperly taken, will serve effectively to retard and stifle sound and necessary management decisions. Such a result, in my opinion, is compatible neither with the law, nor with sound business practice, nor with a so-called free and competitive economy."

E. The decisions of this Court do not support the Board's position.

We have said all that we have to say about *Order of Railroad Telegraphers v. Chicago & Northwestern Railroad Co.*, 362 U.S. 330 (1960) and *Teamsters Union v. Oliver*, 358 U.S. 283 (1959) except that the Board is incorrect in asserting that the latter case involved "a form of subcontracting" (Bf. p. 57); it involved the hiring of trucks to be driven by the employer's own employees, some of whom owned the trucks being hired.

If the *Railroad Telegraphers* case means what the Board says it does, then we do not know how it can be reconciled with the Court's statement in *Virginia Railway Co. v. System Federation*, 300 U.S. 515 (1937), that

> "Whether the railroad should do its repair work in its own shops, or in those of another, is a question of railroad management." 300 U.S. at 557; see our opening brief, p. 25, n. 14.

If the *Oliver* case means what the Board say its does, then we do not know how it can be reconciled with the language of *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) where the Court noted that unions "ordinarily do not take part in negotiations leading to a change in corporate ownership" and referred to

> "the rightful prerogative of owners *independently* to rearrange their businesses and even eliminate themselves as employers . . ." 376 U.S. at 549 (emphasis supplied); see our opening brief, pp. 28-29.

This Court held in the *Borg-Warner* case, *supra*, that the subjects of mandatory bargaining are limited, and we submit that the cases just quoted confirm what we have said about where the limit lies.

II. If Petitioner was under a statutory duty to bargain about whether to let the contract, it satisfied that duty.

The meeting of July 30, 1959, between Fibreboard and the Union's negotiating committee took place against this background:

In each of the annual negotiations during the past few years, Fibreboard had told the Union that its costs were too high and had endeavored to persuade the Union to modify its proposals in the light of that fact (R. 53-54, 103-104). Its efforts had been unsuccessful (R. 104). The Union's current proposals involved increases in all cost items in its contract (R. 61), and in a letter written on July 29, the Union had taken the position that its contract was automatically renewed subject only to an obligation upon the part of Petitioner to negotiate regarding the proposed increases (R. 51).

Petitioner, in the meeting of July 30, did not tell the Union that its decision to contract out the work was irre-

vocable or assert the existence of a "management prerogative."[17] On the contrary, it explained fully the reasons for its decision (the high costs of which it had previously complained: R. 53-54) and iterated and reiterated its willingness to discuss any questions the Union might have (R. 50, 53, 54). Recognizing that the time for discussion was short, Petitioner said that if the Steelworkers wished the letting of the contract to be deferred so as to permit them "to discuss the maintenance work contract at some later date, they should say so and [Petitioner] would give the request due consideration" (R. 54; see also R. 86), but the Union did not see fit to take advantage of that suggestion (R. 86). Petitioner's statements that negotiation of a new contract would be pointless and that it was not present for that purpose were made in the light of the fact that the only contract proposals before it were those above mentioned. The Union did not understand that Petitioner's mind was closed, for it proposed that the question whether the work should be let to a contractor be submitted to arbitration (R. 88). Petitioner, being unwilling to entrust a business decision to an arbitrator, rejected that proposal (*id.*). There can be only speculation as to the reception that Petitioner would have accorded a Union wage and manning proposal permitting of cost savings, for the Union never made any such proposal or indicated the slightest interest in doing so.

Petitioner engaged in the "prior discussion" which, according to the Board's decision, "is all that the Act contemplates" (R. 21).

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17. The court below in its opinion attributed to Petitioner reliance upon its "management prerogative" (R. 174) and so does the Board in its Brief (p. 65). This is without support in the record. At no time did Petitioner assert a "management prerogative"; never was that phrase or the term "prerogative" used by Petitioner.

It stated its position frankly and supported that position with a statement of its reasons.

It entertained the only proposals which the Union saw fit to make, and rejected them for good and sufficient reasons which it explained.

It proffered further time for discussion, but the Union was not interested.

Yet Petitioner stands convicted of having refused to bargain and is faced with an order requiring it to resume performance of the maintenance operation and reinstate with back pay the individuals who had been employed therein.

In the acoustics provided by the foregoing facts,[18] the Board's assertions in its decision and its Brief that "prior discussion . . . is all that the Act contemplates," (R. 21) that the Act "does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position" (Bf. p. 51), and that an employer need not "yield to a union's demand that a subcontract not be let" (Bf. p. 50) all ring hollow.

What has happened here is an example of the havoc which can be raised with an employer's efforts to run his business by the Board's new concept of the scope of mandatory bargaining.

III. The Board's order violates section 10(c) of the Act and is punitive.

We asserted in our opening brief (p. 39) that the present case "is the first instance in the history of the Act in which the Board has ordered reinstatement in a case involving

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18. Virtually all of the facts stated in the text were set forth in the Trial Examiner's findings, which were adopted by the Board (R. 35). The truth is, as was set forth at page 8, n. 4, of our opening brief, that the Board never considered the question whether Petitioner had in fact satisfied the duty to bargain to which the Board's supplemental decision gave birth.

only a refusal to bargain." The Board asserts that this is not the "whole truth"—that in the case of a strike induced by a refusal practice, it has been the Board's practice to order the reinstatement of the strikers, even though they have been replaced, "as a remedy for the violation of section 8(a)(5)" (Bf. p. 71). That statement is untrue. The theory upon which the Board orders the reinstatement of strikers (whether their strike be economic or induced by unfair labor practices) is that the employer's refusal to take them back constitutes a discharge for union activity and is violative of section 8(a)(3).[19] There will be found no case ordering reinstatement in which the order was not supported by a finding of a section 8(a)(3) violation.

A. The order of reinstatement violates section 10(c).

The only argument advanced by either the Board or the Union in support of their position that section 10(c) goes no further than to protect discharges for misconduct is the

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19. Thus, for example, in *NLRB v. Denton*, 217 F.2d 567 (5th Cir. 1954), cert. den. 348 U.S. 981, the court agreed with the Board that the strike had been induced by the employer's refusal to bargain and was, therefore, an unfair labor practice strike and held:

> "It follows that the striking employees were properly held entitled to reinstatement as of July 9, 1952, the date of their unconditional application, and that the Company's refusal to grant them reemployment was in violation of Sections 8(a)(3) and (1) of the Act." 217 F.2d at 571-72.

In *Waycross Machine Shop*, 123 NLRB 1331 (1959), enf. 283 F.2d 733 (5th Cir. 1960), the Board, after finding that the strike was an unfair labor practice strike induced by the employer's refusal to bargain, held:

> "Accordingly we find that the Respondent was obligated to rehire the strikers when the Union made unconditional application on their behalf on September 26, and that the Respondent's refusal to do so violated Section 8(a)(3) of the Act. We shall therefore order the Respondent to offer the following strikers immediate and full reinstatement to their former or substantially equivalent positions . . ." 123 NLRB at 1336.

Board's incorrect assertion that a contrary interpretation would "upset the settled practice of ordering the reinstatement of unfair labor practice strikers whose positions have been filled by replacements" (Bf. pp. 72-73). As above stated, the theory upon which the Board orders the reinstatement of unfair labor practice strikers is that a refusal to take them back constitutes a discharge for union activity and is violative of Section 8(a)(3). The Board's practice in such cases would be in no way affected by a holding that a discharge for legitimate business reasons is a discharge for cause and protected by section 10(c).

The bare assertion of the Board and the Union that "cause" means no more than misconduct simply contradicts the legislative history to which we have referred and which characterized all discharges for reasons other than "union activity" as discharges for "cause."

> "All this language does is simply to say what the present rule is. If the Board finds that the man was discharged for cause, that is one possible outcome. If it finds that he was discharged for union activity, that is the other outcome." (93 Cong. Rec. 6518 (1947))

The "present rule," as it had been expounded by this Court, was that an employer has the right to discharge an employee "for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible" (*Associated Press v. NLRB*, 301 U.S. 103, 132 (1937); see also *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 46 (1937); *NLRB v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939)).

As for the Board's reference to the present case as one in which "the discharge flows from conduct which constitutes an unfair labor practice," this is merely a restatement of the contention of which we disposed in our opening brief

that the letting of the contract and the termination of the employees were the fruits of the asserted refusal to bargain.

B. The Board's order is punitive.

The Board's assertion that the principle "that restoration of the status quo tends to effectuate the policy of the Act . . . has found a wide variety of applications" (Bf. p. 67) is misleading in the extreme, as is demonstrated by the fact that all of the decisions cited in support of the assertion (p. 67, n. 46) involved violations of sections 8(a)(2) or 8(a)(3) of the Act. It certainly has not been the Board's invariable practice in simple refusal to bargain cases to order restoration of the status quo.[20] Indeed, with the sole exception of the present case and one other,[21] it has refrained from doing so even in cases applying the *Town & Country Manufacturing Company* doctrine.[22]

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20. See, e.g., *General Motors Corporation*, 81 NLRB 779 (1949); *Duro Fittings Company*, 130 NLRB 653 (1961); *American Aggregate Co. Inc. & Featherlite Corp.*, 130 NLRB 1397 (1961), enf. in pt. 305 F.2d 559 (5th Cir. 1962); *Wheatland Electric Cooperative, Inc.*, 102 NLRB 1119 (1953), enf. 208 F.2d 878 (10th Cir. 1953); *Roy E. Hanson, Jr., Mfg.*, 137 NLRB 251 (1962); *Square D Company*, 105 NLRB 253 (1953); *National Furniture, Inc.*, 130 NLRB 712 (1961); *Richfield Oil Corporaton*, 110 NLRB 356 (1954), enf. 231 F.2d 717 (D.C. Cir. 1956); *National Furniture Manufacturing Co., Inc.*, 130 NLRB 712 (1961); *W. T. Grant Co.*, 94 NLRB 1133 (1951), enf. 199 F.2d 711 (9th Cir. 1952); *Sharon Hats, Incorporated*, 127 NLRB 947 (1960), enf. 289 F.2d 628 (5th Cir. 1961). In none of these cases (and the list is by no means exhaustive) did the Board order restoration of the status quo.

21. *Adams Dairy, Inc.*, 137 NLRB 815 (1962), enf. den., 322 F.2d 553 (8th Cir. 1963). The Board's petition for certiorari is pending.

22. See *Renton News Record*, 136 NLRB 1294 (1962); *Lori-Ann of Miami*, 137 NLRB 1099 (1962); *American Manufacturing Company of Texas*, 139 NLRB 815 (1962); *Weingarten Food Center of Tenn.*, 140 NLRB 256 (1962); *Brown Transport Corporation*, 140 NLRB 954 (1963); *Star Baby Co.*, 140 NLRB 678 (1963); *West Side Lumber Co.*, 144 NLRB No. 14, 54 L.R.R.M. 1029 (1963); *Pepsi Cola Bottling Company of Beckely, Inc.*, 145 NLRB No. 82.

We do not question that the Board is permitted a certain discretion in fashioning a remedy. However, it has no license to abuse that discretion or to base its decision upon facts which exist only in its imagination. *Republic Steel Corporation v. NLRB*, 311 U.S. 7 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *Carpenters Local 60 v. NLRB*, 365 U.S. 651 (1961). If its footnote assertion (R. 25, n. 19) that its order imposed no "undue or unfair burden" on Petitioner can be given the dignity of a finding, the fact remains that it is based upon matters which do not appear of record and which Petitioner was denied the opportunity to disprove (see our opening brief, p. 9). The burden imposed upon Petitioner by the requirement that, after the lapse of three years, it rebuild a supervisory and working force with which to resume, with no prospect of reduced costs, the performance of an operation which had been abandoned as too costly and which might shortly have to be abandoned again for the same reason would not, as the Union asserts, present an obstacle to bargaining prior to a resumption of operations. A satisfactory bargain prior to the resumption of operations would avoid imposition of the foregoing burden.

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55 L.R.R.M. 1051 (1964); *Winn-Dixie Stores, Inc.*, 147 NLRB No. 89, 56 L.R.R.M. 1266 (1964); *Fairbanks Dairy, Division of Cooperdale Dairy Company*, 146 NLRB No. 111, 55 L.R.R.M. 1437 (1964); *Royal Plating and Polishing Co.*, 148 NLRB No. 59, 57 L.R.R.M. 1006 (1964); and *Jersey Farms Milk Service, Inc.*, 148 NLRB No. 139, released October 2, 1964, and reproduced in the Appendix hereto. The foregoing cases involved, variously, contracting out, substitution of a new production process for an old, discontinuance of a business, sale of a business, sale of the premises, closure of a particular plant, transfer of an operation from one plant to another, discontinuance of trucking operations in favor of shipment by common or contract carriers, and discontinuance of a packaging operation in favor of purchase of a prepackaged product. Although some of them involved a section 8(a)(3) violation as well as a refusal to bargain, in not a single one of them did the Board order restoration of the *status quo ante*.

As we have stated above, except for *Town and Country Manufacturing Company, supra,* which involved a section 8(a)(3) violation, and except for *Adams Dairy, Inc., supra,* n. 21, in which enforcement was denied, the present case is the only one applying the Board's new concept of the scope of mandatory bargaining in which the Board has ordered restoration of the *status quo ante.* The most recent of those decisions is *Jersey Farms Milk Service Inc.,* 148 NLRB No. 139, which was released on October 2, 1964, as this brief was being written, and which is reproduced in the Appendix. The capricious character of the Board's order in the present case is demonstrated by a comparison of it with that decision.

In the present case, Petitioner advised the Union in advance of its intention to contract out the work, engaged in the discussion hereinabove set forth, and bargained about, and placed in effect, a plan for severance pay (see our opening brief, p. 4). In *Jersey Farms Milk Service, Inc.,* the employer contracted out the work of its transport division without any prior notice to the union. The employer did not meet with the union until nearly a month later, when, according to the Trial Examiner, the following occurred (Appendix, p. 14):

> "Business Representative Sloan asked that the men be put back to work. Counsel for Respondent asked if Charging Party had some proposal other than putting the men back to work but there was none. The meeting broke up with Charging Party asking Respondent to think about it and call them back."

That was the end of the matter.

The Board based its order denying restoration of the status quo ante upon four factors which it set forth as follows (Appendix, p. 2):

"(a) Respondent's earlier history of harmonious labor relations with the Union;" (In the present case, Petitioner had had a harmonious bargaining relationship with the Union for 22 years);

"(b) the absence of any apparent antiunion motivation in the unilateral subcontracting;" (In the present case, the Board has found that there was no antiunion motivation).

"(c) the economic hardship both to Respondent and to third party interests that full restoration of the *status quo ante* would entail;" (The third party interests to which the foregoing referred were those of the contractor. In the present case, Fluor will be deprived of its contract and its men of their jobs. As for the hardship to Petitioner, see our opening brief, pp. 43-45, 46).

"and (d) Respondent's subsequent willingness to bargain with the Union about the subcontract as detailed below." (This refers to the meeting set forth as above in the trial examiner's finding, in which a union proposal that the men be put back to work came to nothing. Compare the meetings between Petitioner and the Union *before* the contract was let, during which Petitioner, among other things, bargained about a plan for severance pay, which it placed in effect.)

We submit that the Board's order in the present case is capricious and is punitive.

CONCLUSION

We submit that the Board's Supplemental Decision and Order were erroneous for each and every one of the reasons which we have stated and that they should be denied enforcement and should be vacated.

Respectfully submitted,

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(Appendix follows)

Appendix

United States of America
Before the National Labor Relations Board

Case No. 26-CA-1540

Jersey Farms Milk Service, Inc.
and
Amalgamated Meat Cutters & Butcher Workmen of North America Local 405, AFL-CIO

DECISION AND ORDER

On November 13, 1963, Trial Examiner George L. Powell issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision and briefs in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modifications.

We agree with the Trial Examiner, for the reasons stated in his Decision, that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting the work of its transport division on April 8, 1963, without first notifying and bargaining with the Union. However, we do not agree with the Trial Examiner's proposed remedy for the following reasons:

In fashioning our affirmative orders, we bear in mind that the remedy should be molded to the particular situation requiring redress.[1] Having scrutinized the record and weighed the particular facts and circumstances surrounding this case, including cumulatively (a) Respondent's earlier history of harmonious labor relations with the Union[2] (b) the absence of any apparent antiunion motivation in the unilateral subcontracting; (c) the economic hardship both to Respondent and to third party interests that full restoration of the *status quo ante* would entail;[3] and (d) Respondent's subsequent willingness to bargain with the Union about the subcontract[4] as detailed below—we agree with the finding of the Trial Examiner that an order to restore the *status quo ante* is inappropriate in this case.[5]

Even though the unilaterally discontinued operation is not ordered restored, effectuation of the policies of the Act does require that the Respondent be directed now to remedy the violation found by offering to bargain about resumption of the operation it contracted out and any proposed alternatives thereto, including steps that might be taken to

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1. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 338, 348.
148 NLRB No. 139

2. *Crown Zellerbach Corporation*, 95 NLRB 753.

3. *Renton News Record*, 136 NLRB 1294.

4. *Hartmann Luggage Company*, 145 NLRB No. 151.

5. *Winn-Dixie Stores, Inc.*, 147 NLRB 89.

minimize the effects upon employees of the action taken.[6] And while under other circumstances we might have considered it appropriate to require the Respondent to make whole its transport division employees for all losses of pay they may have suffered during the period from April 8, 1963, the date of the violation, until the date such violation is fully remedied,[7] we do not believe that the full measure of such remedial relief is warranted under the special facts of this case. Thus it appears that the Respondent did meet with the Union on May 6, 1963, at which meeting only the question of reinstating the men was discussed.[8] Although the parties did not "bargain" to impasse on that occasion concerning the subcontracting, we believe that to the extent the reinstatement of employees was discussed, the Employer discharged his duty to bargain on that aspect of the matter. Consequently, we are limiting remedial monetary relief to the employees to the period between April 8 and May 6, 1963.[9] Our order, in short, recognizes that the backpay obligation terminates on May 6, 1963, but that the bargaining obligation still exists.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Jersey Farms Milk Service,

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6. *Ibid.*

7. *Ibid.*

8. At that time only two of the men had lost employment; the remainder had been either transferred by the Respondent or hired by the subcontractor.

9. Backpay shall be based upon the earnings which the affected employees would normally have received during the mentioned period less any net interim earnings, with interest at 6 percent per annum. *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively with Amalgamated Meat Cutters & Butchers Workmen of North America, Local 405, AFL-CIO, as the exclusive representative of its employees in the appropriate bargaining unit,[10] by unilaterally contracting out work affecting the terms and conditions of employment of employees within the aforesaid unit without prior notice to, and bargaining with, the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the Union named above, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all such activities.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Bargain with Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO, with respect to the contracting out of the transport division work, including the possible restoration of the transport division, and the effects of contracting out the work of the said division upon the employees thereof.

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10. The appropriate unit is composed of all employees of Respondent, employed at Nashville, Gallatin, Cookeville, McMinnville, Tullahoma, Shelbyville, Columbia, Lawrenceburg, Hohenwald, Dickson, Clarksville, Camden, and Murfreesboro, Tennessee, excluding all office clerical employees, managers, route managers, city salesmen, field men, professional employees, guards, watchmen, and supervisors as defined in the Act.

(b) Put in writing and sign any agreement made as a result of such bargaining.

(c) Make whole the employees of the transport division, in the manner set forth in this Decision, for any loss of earnings which they may have suffered during the period from April 8, 1963, to May 6, 1963, by reason of the Respondent's unilateral action in subcontracting the work of that division.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of reimbursement due under the terms of this Order.

(e) Post in its plant in Nashville, Tennessee, copies of the notice attached hereto marked "Appendix."[11] Copies of such notice, to be furnished by the Regional Director for the Twenty-sixth Region, shall after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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11. In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

(f) Notify the Regional Director for the Twenty-sixth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C.

.....
Frank W. McCulloch, Chairman

.....
John H. Fanning, Member

.....
Gerald A. Brown, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> We will not fail or refuse to bargain collectively with Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO, as the exclusive representative of all our employees in the appropriate bargaining unit described herein by unilaterally contracting out work affecting the terms and conditions of employment of employees within the bargaining unit without prior notice to, and bargaining with, the aforesaid Union.
>
> The appropriate bargaining unit is:
>
> > All employees of Respondent, employed at Nashville, Gallatin, Cookeville, McMinnville, Tullahoma, Shelbyville, Columbia, Lawrenceburg, Hohenwald, Dickson, Clarksville, Camden, and Murfreesboro, Tennessee, excluding all office clerical employees, managers, route managers, city salesmen, field men, professional employees, guards, watchmen, and supervisors as defined in the Act.
>
> We will not in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of col-

lective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

We will bargain collectively with Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO, with respect to contracting out the transport division work, including the possible restoration of the transport division, and the effects of contracting out the work of the said division upon the employees thereof.

We will put in writing and sign any agreement made as a result of such bargaining.

We will make whole the transport division employees for any loss of earnings which they may have suffered during the period from April 8, 1963 to May 6, 1963, by reason of our unilateral action in subcontracting the work of that division.

All our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named or any other labor organization.

JERSEY FARMS MILK SERVICE, INC.
(Employer)

By.....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee, 38103, (Tel. No. 534-3161), if they have any question concerning this notice or compliance with its provisions.

United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

Case No. 26-CA-1540

Jersey Farms Milk Service, Inc.	Respondent
and	
Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO	Charging Party

John Langley, Esq., of Memphis, Tenn., for the General Counsel.

Olin White, Esq., of Nashville, Tenn., and *Dick Lansden, Esq.*, of Nashville, Tenn., for the Respondent.

Ronald G. Sloan, Secretary-treasurer and Business Representative of Charging Party, of Nashville, Tenn., and *Billy Atnip*, Assistant Business Representative of Charging Party, of Nashville, Tenn., for the Charging Party.

Before: *George L. Powell*, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

This case, heard by Trial Examiner George L. Powell at Nashville, Tennessee, on September 4, 1963, pursuant to a charge, a first amended charge and a second amended charge filed on May 21, June 21, and July 19, 1963, respectively by

the Charging Party,[1] a complaint by the General Counsel filed on July 19, 1963, and an answer filed August 2, 1963, presents a single issue: whether Respondent[2] refused to bargain in good faith within the meaning of Section 8(a)(5) of the Act[3] by contracting out the work formerly performed by its Transport Division, and this action was based solely on economic considerations and not on any antiunion considerations. The defense of Respondent is that it had the right to do what it did under its present collective-bargaining contract and that the Charging Party knew Respondent was going to contract out the work before it was done and did not request bargaining over it.

The Respondent and the General Counsel made oral argument at the hearing and filed briefs with the Trial Examiner on September 24 and 25, 1963, respectively.

Upon consideration of the entire record[4] in this case, including the briefs of the parties, and upon my observation of each of the witnesses appearing before me, I made the following:

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1. Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO.

2. *Jersey Farms Milk Service, Inc.*

3. National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* Section 8(a)(5) of the Act is as follows:

> SEC. 8(a) It shall be an unfair labor practice for an employer—
>
> (5) to refuse to bargain collectively with the representative of his employees, . . .
>
> (d) For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .

4. Respondent has moved to correct the record in one particular. The General Counsel agrees and the record is corrected as follows: Page 54, line 3, the words "The Witness" is changed to, "Mr. Langley."

Findings of Fact

I. The business of Respondent

Respondent, a Tennessee corporation, operates a plant located in Nashville, Tennessee, where it is engaged in the purchase, processing, and retail sale and distribution of milk products. During the 12-month period immediately preceding the hearing, it sold and distributed more than $500,000 worth of its products. During the same period of time, Respondent purchased and received at its Nashville, Tennessee, plant for use in its processing, retail sale and distribution, goods and supplies valued in excess of $50,000 directly from points outside the State of Tennessee. I find, as admitted by the parties, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. (*Siemons Mailing Service*, 122 NLRB 81.)

II. The labor organization involved

Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO, is, as admitted by the parties, a labor organization within the meaning of Section 2(5) of the Act.

III. The alleged unfair labor practices

The facts in this matter are largely undisputed and all of the witnesses testified credibly to the facts as remembered by them.

Respondent and the Charging Party have had a pleasant collective-bargaining relationship over a period of several years in an appropriate unit composed of all of Respondent's employees employed at Nashville, Gallatin, Cookeville, McMinnville, Tullahoma, Shelbyville, Columbia, Lawrenceburg, Hohenwald, Dickson, Clarksville, Camden and Mur-

freesboro, Tennessee, excluding all office clerical employees, managers, route managers, city salesmen, field men, professional employees, guards, watchmen and supervisors as defined in the Act. These employees number about 120.

At the time the current contract, which runs from January 1, 1963, to December 31, 1965, was being negotiated, the three officers of Respondent, its president, vice president and secretary had discussed among themselves contracting out the work performed by the Transport Division, but no mention of this was made to the Charging Party during contract negotiations.

Leslie F. Vantrease, Sr., Respondent's president, credibly testified that the reason no mention was made to the Charging Party about the possibility of contracting out the work of the Transport Division was because his legal counsel had told him it was unnecessary being part of management's prerogative and as such was covered by Article 6 of the current agreement.

On April 8, 1963, Respondent signed a contract with Byron Ross under which Ross agreed, for a price, to do the work formerly done by six (6) employees in the Respondent's Transport Division, namely: Claude Woods, Lewis Moore, Burton Robertson, Howard Wright, Joe Helms and Ross. Ross voluntarily quit his employment with Respondent in order to sign the contract to haul. He in turn hired Wright and Helms after they, like Moore and Robertson, had been laid off by Respondent for lack of work when the Ross contract was signed.[5] There is no question but what the whole arrangement with Ross was a bona fide arrangement. The General Counsel stipulated that an independent contractor arrangement was set up.

5. Moore and Robertson are still unemployed although Moore worked 3 weeks during the vacation period of Woods, who was retained by Respondent in another capacity.

The Respondent sold its equipment. It sold its stake truck on the open market and sold its two tractors and three trailers to Ross.

The Respondent was convinced that this operation would save it money. It studied cost figures which showed a savings in money and after 22 weeks of actual operation it is saving around $230 a week.

During the week immediately preceding Monday, April 8, 1963,[6] Atnip accidentally met Vantrease, Jr. in a restaurant and told him that he had heard of a rumor that Respondent was going to contract out the work of the Transport Division. Vantrease, Jr. told him they "were thinking about selling the trucks to Ross or somebody but that's not official." Vantrease, Jr. admitted telling Atnip that Respondent was considering contracting the transport long-haul division to Ross and that it was accidental that the matter came up at all.[7]

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6. Billy H. Atnip, assistant business representative of Charging Party places the time as "two or three days" before April 8, 1963, and Leslie F. Vantrease, Jr., Respondent's secretary places the time "in the neighborhood of a week" before.

7. The testimony is as follows:

Q. Did you seek out Mr. Atnip that day or did you and he just happen to be talking about something?

A. [Vantrease, Jr.] I am sure we just happened to meet and be talking about something. I really don't remember how we did meet, other than I remember that we met over at the restaurant.

Q. It was more or less accidental?

A. It was accidental. It wasn't planned on my part.

Q. And the fact that the conversation about the long haul came up is more or less an accident. This wasn't planned on your part, either?

A. No, sir.

Q. In fact, like your father Mr. Vantrease, Sr., you considered this to be a matter purely of management prerogative?

A. That is correct.

Q. And you had no intention of consulting with the union about the matter?

A. None whatsoever until after the contract was signed. . . .

On April 8, 1963, as noted earlier, Respondent did enter into the contract for the Transport Division work with Ross. Also on the same date the Charging Party wrote Respondent a letter in which it stated it . . . files a complaint which contests your right to contract Transport Drivers' work out." In the same letter it told Respondent it had no right to lay off Transport Workers so long as transport driving was required in selling products.

Further it accused Respondent of violating the agreement and insisted it stop from completing the arrangement it had heard it intended to go through with; it insisted that laid-off drivers be reemployed and no more be laid off; and it requested a meeting "at your earliest possible convenience."

Respondent did not answer the April 8 letter.

Charging Party wrote again on April 12, 1963, seeking a "negotiating meeting" and notifying Respondent that it considered Respondent to have violated Section 8(a)(5) of the Act citing as its authority the *Town & Country* case.[8]

On May 2, 1963, Respondent told Charging Party it would meet on May 6, 1963. On that day there was a meeting attended by representatives of both parties. Business Representative Sloan asked that the men be put back to work. Counsel for Respondent asked if Charging Party had some proposal other than putting the men back to work but there was none. The meeting broke up with Charging Party asking Respondent to think about it and call them back.

Respondent maintains that it had the right to do what it did under the management prerogative provision of Article 6 and under Article 35. Article 35 has restrictive language

8. *Town and Country Manufacturing Company* (49 LRRM 1918).

but no restriction as to what Respondent did. These clauses are as follows:

> ARTICLE 6—Management Rights
>
> The Management of the business in all its phases and details is vested in the Employer. The Employer, however, shall comply with the terms of this agreement, and will not discriminate against any employee.
>
> ARTICLE 35—Loading and Unloading
>
> All present loading and unloading policies will be continued with no changes in regard to transports, retail, and wholesale trucks for the period covered by this agreement.

Respondent argues that Charging Party knew of its plans to contract out the Transport Division work to Ross both through Ross who was a steward of Charging Party and through Atnip who talked of the rumor to Vantrease, Jr. Further it argues that Charging Party must have known of the plans because it wrote a letter dated the same day the Ross contract was entered into. And knowing of its plans, Charging Party did nothing to request bargaining (the theory of Respondent being that there can be no refusal to bargain by an employer without a request by the Union) and Respondent then changed its position before it knew of Charging Party's concern.

In support of this defense, Respondent brought out the fact that in past history, somewhere between August 1 and September 16, 1960, it told Sloan, during contract negotiations, that it was going to sell its tank trucks and Sloan did not object, in fact Sloan told them they were within their rights and there no longer was a discussion on this point. Respondent sold the trucks with no complaint.

Analysis and Decision

Law is composed of the life juices of the people.[9] The thrust of the recent Board[10] decisions, such as *Town & Country*,[11] is to bring management and the collective-bargaining agent of the employees closer and closer together in a respectful and respected relationship while doing their own jobs in an effort to advance the interest of both the employer and employee. This is a matter of mood, and in certain respects is like a marriage.

Going back only into the recent past, it can be remembered when women in this country had no civil rights. They could not vote for their Government. All that is past and women have a rightful place in the community. And they have a place in the home as a full-fledged partner, albeit their position is rarely exactly the same in different homes.

But we can well imagine the almost universal cry in every home in the land should the husband, without first talking it over with his wife, rent out the spare room in the home to a lovely young roomer, be she blonde, brunet or red head! The same thing is true, with perhaps a difference in degree, should the husband just sell his wife's beloved fur coat! These things just cannot be done if the "marriage" is to be kept going. The public interest in labor-management relations is to keep the parties together.

The Congress states it thusly:

> It is hereby declared to be the policy of the United States . . . [to encourage] the practice and procedure of collective bargaining . . . by protecting the exercise

9. See *Felix Frankfurter Reminisces, Reynal & Co.*, N. Y. 1960.

10. National Labor Relations Board.

11. *Town & Country Mfg., Inc. v. N.L.R.B.*, 316 F.2d 846 (C.A. 5). See *Fibreboard Paper Products Corp. v. N.L.R.B.*, 53 LRRM 2666 (C.A. D.C.); *N.L.R.B. v. Katz*, 369 U.S. 736; and *N.L.R.B. v. Brown-Dunkin*, 287 F.2d 17 (C.A. 10).

> by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . . .[12]

Following this policy, when employers unilaterally take steps which destroy in whole or in part that which the union has obtained through the processes of collective bargaining, the Board holds that the employer is not doing what he should be doing under the Act and the employer is ordered to do the proper thing. In some cases, it is even ordered to recreate the same situation as it was before it took the unilateral action. Management prerogative clauses in contracts do not go so far as to permit substantive changes in the wages, hours and terms and conditions of employment of employees in the appropriate collective-bargaining unit.

Of course, labor relations cannot really be likened to marriage. But the mood of a successful marriage, the give-and-take and the mutual respect, is the dream the Board has in mind in carrying out the public policy when it requires management to *first* bargain with the union before it takes action such as contracting out work over which it has previously bargained with the union. That is this case. The Respondent here bargained with the Union over the employees in the appropriate unit and shortly after agreeing on the terms, unilaterally changed its operations to the detriment of certain of the employees. Bargaining in good faith within the meaning of the Act is a continuing thing not stopping with the execution of a collective-bargaining agreement but continuing so long as the union is the exclusive representative of the employees.

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12 Section 1, fifth paragraph of the Act.

The fact that Respondent had done a somewhat similar thing and contracted out work in 1960 with no objections by the Charging Party is certainly an ameliorating influence but it does not excuse the present action which was done after the law on the matter had developed in a different direction. The Circuit Court for the Fifth Circuit on April 29, 1963 affirmed the earlier decision of the Board in the Town & Country case, *supra.* It is appropriate at this time to set out and discuss some of the case law on the subject. In a case not yet reported, but one on all fours with the instant case, the United States Court of Appeals for the Eighth Circuit in the case *Adams Dairy, Inc.* (137 NLRB 815), Case No. 17,171, on September 12, 1963, *denied* enforcement of the Board's Order which found that the Respondent in that case had violated Section 8(a)(5) of the Act when it discharged its driver-salesmen and replaced them with independent contractors without first notifying and consulting with the employees' certified bargaining representative. The Court seemed to regard it as significant that there was no showing that the company was motivated by antiunion consideration. Additionally the Court found support for its view in the case of *Erie Resistor Corp.*, 323 U.S. 221.

The Board has now petitioned the Court for a rehearing in the matter, contending that the question of antiunion motive is completely irrelevant in the case as that would go only to a finding of a violation of Section 8(a)(3) which was not involved therein. The Board further contended that reliance upon *Erie Resistor* "misconceived the scope of that decision." The Board's brief states:

> *Erie Resistor* involved a grant of superseniority to replacements for strikers and strikers who return to work during a strike, and the basic issue was whether

this policy, which by its very nature discriminated between employees on the basis of strike activity, was violative of Section 8(a)(3) and (1) of the Act irrespective of the employer's motive. The Supreme Court, although acknowledging that an antiunion motive is generally required to establish discrimination within the meaning of Section 8(a)(3), agreed with the Board that the superseniority policy was so discriminatory and so interfered with the right to strike guaranteed by Sections 7 and 13 of the Act that it violated Section 8(a)(3) even though the employer may have been motivated only by a desire to keep his plant operating. To be sure, the court further held that the company had refused to bargain in violation of Section 8(a)(5) of the Act, but this was wholly contingent upon the first finding that the superseniority policy constituted discrimination in violation of Section 8(a)(3); that is, the sole basis for the Section 8(a)(5) finding was that the employer, in contract negotiations had insisted upon including in the contract an illegal clause, one recognizing a superseniority policy which was unlawful under Section 8(a)(3).

The Board had not found in the *Adams* case that the Company had discriminated in violation of 8(a)(3) of the Act and stated in its brief for rehearing that such a finding was not required for it to make a finding of violation of Section 8(a)(5). It argued that the refusal to bargain in *Adams* did not consist of demanding an illegal clause as was the situation in *Erie Resistor* but rather consisted of taking action without notifying or consulting the bargaining representative. In the latter situation, the Board's brief argues, the employer's motive, his good or bad faith, is

irrelevant in determining whether there has been an unlawful refusal to bargain. The only questions are whether the subject is within the area of wages, hours, or other terms and conditions of employment, and whether the employer took action on that subject without first consulting with the union. Reference was made to the case of *N.L.R.B. v. Katz*, at 369 U.S. 736 where unilateral action was found to violate Section 8(a)(5) notwithstanding the employer's subjective good faith.

In some of the previous subcontracting cases like *N.L.R.B. v. Brown-Dunkin*, 387 F.2d 17 (C.A. 10) and *Town & Country. Mfg. Co., Inc. v. N.L.R.B.*, 316 F.2d 846 (C.A. 5), referred to above, the evidence showed not only that the employer failed to discuss the subcontracting issue with the union, but that the subcontracting was motivated by a desire to defeat the union rather than by economic consideration. In these circumstances, argues the Board, there are two unfair labor practices; the failure to discuss the matter with the union constitutes a refusal to bargain in violation of Section 8(a)(5), and the illegal motivation warrants the additional finding that the action was discriminatory in violation of Section 8(a)(3). However, the fact that these two unfair labor practice findings are justified in these cases does not mean that, where as here the illegal motivation which may be necessary to support an 8(a)(3) finding is lacking, the separate 8(a)(5) finding cannot be made. See *Fibreboard Paper Products Corp. v. N.L.R.B.*, 53 LRRM 3666 (C.A. D.C.) wherein the Court stated:

> It is not necessary to find an antiunion animus as a credit for the conclusion that the employer violated Section 8(a)(5), which commands good-faith bargaining on wages, hours, and terms and conditions of employment.

Accordingly, applying the principles of the Board in the case at issue, a refusal to bargain finding is warranted even though the Company may have been motivated by business, rather than antiunion, consideration. The Company here acted unilaterally without prior notice to or discussion with the Union. The action taken involved a change in wages, hours, and other terms and conditions of employment, in both a literal and a very real sense. The jobs of the employees in the transport division were abolished; they lost their status as employees and were replaced by independent contractors. Such action altered their wages, hours and other terms and conditions of employment to a far greater extent than if the Respondent had merely reduced wages or increased working hours. There is no question that these lesser changes are bargainable matters to which unilateral action by the Employer is precluded. *A fortiori*, the same conclusion should follow with respect to the more drastic changes in employee status which flow from a decision to eliminate employees' jobs altogether.[13] Accordingly, I find that Respondent, by failing to notify and bargain with the Union about the change to an independent contractor system before putting it into effect, violated the requirements of Section 8(a)(5) of the Act, irrespective of the Company's motive.[14]

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13. Of course, this does not mean that the Employer cannot contract out an operation unless the Union approves. It merely means that the Employer must afford the Union a reasonable opportunity to bargain about the proposed action before he makes a final decision.

14. Respondent contends in its brief that it did not act unilaterally "without prior notice to or discussion with the union" inasmuch as sometime prior to April 8, the date of the independent contract, " . . . the Respondent's corporate secretary, who handles labor relations for the Respondent, talked to the Union's assistant business agent, Mr. Atnip, and advised Mr. Atnip that the Respondent was considering making a change in the transportation division,

Having found that Respondent failed to bargain in good faith within the meaning of Section 8(a)(5) of the Act when it contracted out the work of the Transport Division without first meeting with and bargaining with the Charging Party herein, I find further that Section 8(a)(1) is violated inasmuch as it always is derivatively violated with a violation of Section 8(a)(5).

IV. The effect of the unfar labor practices upon commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes

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that is contracting out long haul work." At a point later on its brief, Respondent referred to this meeting between the two men identified above as a "conference." The facts on the contrary, indicate that this meeting is no "conference." Neither of the two parties could testify exactly as to when the meeting took place one testifying that it was some "3 to 5 days before" and the other a week before the contract was signed. This indicates a lack of importance in the meeting. Further, Atnip had heard rumors about the work being contracted out so when he found the company representative in a nearby restaurant he asked him about it. In his inquiry, Vantrease, Jr. replied, . . . "we are thinking about selling the trucks to Ross or somebody, but that's not official." Also according to Vantrease, Jr., he told Atnip that Respondent was *considering* contracting the transport long-haul division to Ross. Also Vantrease, Jr., admitted that it was accidental that the matter came up at all and that he would not bargain with Respondent over this as he believed he had the right to contract out the work under the present contract.

Laying aside for the moment Respondent's position that its management prerogative clause gave it the right to take this unilateral action and considering only the proposition that notice and discussion had been held with the Union before the action was taken, it also lacks merit under the facts. Here there were mere rumors. If checking out rumors were to acquire the standing of bargaining collectively it is conceivable that management and labor could be devoting the bulk of their time checking out rumors rather than engaging in constructive, mutually trustful endeavors.

burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. The Charging Party is the duly selected collective-bargaining agent for the employees in an appropriate unit designated as follows:

> All employees of Respondent, employed at Nashville, Gallatin, Cookeville, McMinnville, Tullahoma, Shelbyville, Columbia, Lawrenceburg, Hohenwald, Dickson, Clarksville, Camden and Murfreesboro, Tennessee, excluding all office clerical employees, managers, route managers, city salesmen, field men, professional employees, guards, watchmen and supervisors as defined in the Act.

By unilaterally contracting out the work of the Transport Division, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has violated Section 8(a)(5) and (1) of the Act, I will order it to cease and desist from any like or related conduct.

However, as the record shows that Respondent was motivated solely by economic considerations; that the blessings of these economies were actually received in the passage of time since the contracting of the work, and that contracting out work without bargaining had been done in the past, I will not order Respondent to cancel its contract with Ross and rehire the five former employees and go back to its former practice of doing its own hauling. All the trucks and

tractors have been sold off. Respondent would be put at great expense to create the situation as it was before its contract with Ross, and, even if that were to be done the results of bargaining collectively with the Charging Party might well result in again selling the equipment and contracting out the work. Obviously money would be lost in either or both transactions. Under these circumstances such loss would be wasteful and not constructive. It would seem to penalize both the Employer and the employees. I believe it would be more equitable for the Respondent to be ordered to now bargain with the Charging Party over the matter and to carry out whatever arrangements were agreed upon as a result of this collective bargaining. As the action of Respondent in unilaterally carving out part of the collective-bargaining unit has an impact on the whole wage structure, it materially breached the agreement.

Also because of this breach and in addition to the preceding paragraph, I will order Respondent to bargain with the Charging Party upon so much of the wages, hours and terms and conditions of employment of all employees in the unit as the Charging Party requests and, if necessary, agree to a wholly new collective-bargaining agreement.

It is recognized that man should reach for more than he can grab, and, on the other hand, that he be forced to give up some of that he had when interests of the public are put into the balance. Both parties in this matter seem very familiar with the law which in one aspect holds that good-faith collective bargaining does not require the making of concessions.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I

recommend that the Respondent, Jersey Farms Milk Service, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from unilaterally contracting out work or unilaterally taking any action relating to the terms and conditions of employment, such matters being mandatory subjects of collective bargaining within the meaning of Section 8(a)(5) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Bargain with the Charging Party with respect to the contracting out of the Transport Division.

(b) Bargain with the Charging Party over so much of the wages, hours, and terms and conditions of employment in the bargaining unit as requested by the Charging Party as if the present collective-bargaining agreement between the parties were not in effect.

(c) Put in writing and sign any agreement made as a result of such bargaining, and

(d) Post in its plant in Nashville, Tennessee, copies of the notice attached hereto and marked Appendix.[15] Copies of such notice, to be furnished by the Regional Director for the Twenty-sixth Region, shall after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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15. If these Recommendations are adopted by the Board, the words, "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

(e) Notify the Regional Director for the Twenty-sixth Region, in writing within 20 days from the date of the receipt of this Decision what steps the Respondent has taken to comply herewith.[16]

Dated at Washington, D. C.

/s/ GEORGE L. POWELL
George L. Powell
Trial Examiner

16. If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twenty-sixth Region, in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

As Recommended by a Trial Examiner of
The National Labor Relations Board

We are posting this notice to inform our employees of the rights guaranteed them in the National Labor Relations Act:

We will not contract out work without first bargaining over it with Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO, or any other labor union which may represent an appropriate unit of our employees.

All our employees have the right to form, join, or assist any labor union, or not to do so. We will not interfere with our employees in the exercise of these rights.

We will bargain with Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO, over wages, hours and other terms and conditions of employment in the unit composed of

All employees of Respondent, employed at Nashville, Gallatin, Cookeville, McMinnville, Tullahoma, Shelbyville, Columbia, Lawrenceburg, Hohenwald, Dickson, Clarksville, Camden and Murfreesboro, Tennessee, excluding all office clerical employees, managers, route managers, city salesmen, field men, professional employees, guards, watchmen and supervisors as defined in the Act

and will reduce to writing and sign any agreement entered into as a result of such bargaining.

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL 405, AFL-CIO
(Labor Organization)

By .....
(Representative) (Title)

Dated.....

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee 38103 (Tel. No. 534-3161), if they have any questions concerning this notice or compliance with its provisions.